PUBLIC PROSECUTOR

v.

TAN KIT LENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. AZMI J
[CRIMINAL APPEAL NO. 136 OF 1981]
2 AUGUST 1982

CRIMINAL LAW AND PROCEDURE: *Charges under Law Reform (Eradication of Illicit Samsu) Act 165/76 - 1st respondent charged for 3 offences - 1st, 2nd and 3rd respondents jointly charged for one offence - All four offences committed on same date, time and place - Two charges against 1st respondent withdrawn by prosecution - Acquitted and discharged - 1st respondent pleaded guilty to the 3rd charge - Convicted and fined - 1st, 2nd and 3rd respondents, claimed trial to the joint charge - Whether plea of autrefois acquit and convict applies.*

This was an appeal by the Public Prosecutor against the order of the Magistrate's Court, Klang wherein the 3 respondents were acquitted and discharged on a plea of *autrefois* acquit and convict. The respondents were originally charged in the Sessions Court, Klang *vide* Cases SA 189/79 and SA 190/79 for offences under the Law Reform (Eradication of Illicit Samsu) Act 165/76 alleged to have been committed on 3 September 1979 at about 6.05 p.m. at house No. 264, Jalan Binjai Pandamaran, Pelabuhan Kelang.

On an application by the prosecution, the President of the Sessions Court made an Order of joint trial of both cases on 19 September 1979 before transferring them to the Magistrate's Court upon which the cases were registered as MA 1339/81 and MA 1338/8. In case MA 1338/81, the 1st respondent was charged for 3 offences under the Act, namely under (i) s. 4(1)(a); (ii) s. 12(i) and (iii) s. 14 whilst in case MA 1339/81 - the case under appeal - all the three respondents were jointly charged for one offence under the same Act for voluntarily obstructing Insp. Hussain in the execution of his duty, an offence under s. 12(b) of the Act, read with s. 34 of the Penal Code. However, before the two cases were transferred to the Magistrate's Court but after the order of joint trial had been made, two of the charges against the 1st respondent were withdrawn by the prosecution and consequently, he was acquitted and discharged. When the respondents appeared before the Magistrate after the transfer, the 1st respondent pleaded guilty to the 3rd charge and he was convicted on 29 September 1981 and fined RM50 in default 5 days' imprisonment. The 1st respondent and the other two respondents however claimed trial to the joint charge when the case came up for hearing on 5 December 1981. Counsel for the respondents raised a plea of *autrefois* acquit and convict by way of preliminary objection on the ground that in case MA 1338/81 the 1st respondent had already been dealt with for the 3 offences arising out of the same transaction as the offence of obstruction in case MA 1339/81 - the case under appeal. The learned Magistrate upheld the objection and acquitted and discharged the 3 respondents.

Held:

[1] For s. 302(i) of the Criminal Procedure Code to apply, there should be more than one trial in respect of the same person. In this case there was only one trial in respect of the four charges which was allowed under ss. 165 & 170 Criminal Procedure Code, and the fact that in the course of that trial the prosecution had withdrawn two charges against the 1st

respondent, and he had pleaded guilty to one charge would not transform the proceedings into two separate trials. The joint trial was part-heard and, as such, no plea of *autrefois* convict or of *autrefois* acquit can apply under s. 302(i).

[2] Although it was very clear that the four charges in the two cases arose out of the same transaction, but it was equally very clear, on the facts, that the four charges were distinct offences. The charge in the present appeal was a distinct offence from the three offences for which the 1st respondent had been dealt with earlier.

[3] In any event, s. 302(ii) Criminal Procedure Code also does not apply and the plea of *autrefois* convict and *autrefois* acquit cannot succeed in favour of the three respondents.

[4] As regards the 2nd and 3rd respondents, there was no basis at all on which the plea can succeed either under subsection (i) or (ii) of s. 302. They were not even involved in the first case MA 1338/81 and have never been acquitted or convicted for an offence connected with the present charge. As such, the learned Magistrate was wrong in upholding the preliminary objection.

[5] On the facts of the present case, the learned Magistrate had erred in law and in fact in acquitting the three respondents by applying the principle of *autrefois* acquit and *autrefois* convict, as the circumstances surrounding the two cases did not warrant the invoking of s. 302 Criminal Procedure Code.

[Appeal allowed. Order of acquittal and discharge set aside. Retrial ordered before another Magistrate.]

Cases referred to:
Connelly v. DPP [1964] AC 1254
Perumal Chettiar v. PP [1957] MLJ 192
Sau Soo Kim @ Tai Tau Chye v. PP [1974] FC Cr App 22

Legislation referred to:
Criminal Procedure Code, ss. 4(1)(a), 12(b), 12(i), 14, 165, 170, 302(i), (ii), 303(i)
Law Reform (Eradication of Illicit Samsu) Act 1976, ss. 4(1)(a), 12(i), 12(b), 14
Penal Code, s. 34.

For the appellant - Gooi Soon Seng, DPP
For the respondents - B. Rajadurai

JUDGMENT

Mohd. Azmi J:

This is an appeal by the Public Prosecutor against the order of the Magistrate at Klang in acquitting and discharging the three respondents on a plea of *autrefois* acquit and convict.

The respondents were originally charged in the Klang Sessions Court *vide* Cases SA 189/79 and SA 190/79 for offences under the Law Reform (Eradication of Illicit Samsu) Act 165/76. On application made by the Prosecution, the President of the Sessions Court made an Order of joint trial of both cases on 19 September 1979 before transferring them to the Magistrate's Court. In the Magistrate's Court, Case SA 189/79 was re-registered as MA 1339/81 and Case SA 190/79 as MA 1338/81, In Case MA 1338/81, the first respondent was charged for three offences under the Act, whilst in Case MA 1339/81 - the case under appeal - the first, second and third respondents were jointly charged for one offence under the Same Act. The three offences preferred against the first respondent in MA 1338/81 were, firstly, for trafficking in illicit samsu, an offence under s. 4(1)(a); secondly, for destroying a plastic container containing

¼ gallon of intoxicating liquor for the purpose of preventing its seizure, an offence under s. 12(i); and, thirdly, for using abusive language against Inspector Hussain, an offence under s. 14 of the Act. In MA 1339/81, the first respondent Tan Kit Leng was jointly charged with Lim Boon Hoe (Second respondent) and Lim Kim Lian (Third respondent) for voluntarily obstructing Inspector Hussain in the execution of his duty, an offence under s. 12(b) of the Act, read with s. 34 of the Penal Code. All the four offences in the two cases were alleged to have been committed on 3 September 1979 at about 6.05 p.m. at house No. 264, Jalan Binjai, Pandamaran, Pelabuhan Kelang. It is therefore clear that all the four offences arose out of the same incident and transaction, although only the first respondent faced all the four charges, whilst the second and third respondents only faced one charge jointly with the first respondent for obstructing Inspector Hussain. However, before the two cases were transferred to the Magistrate's Court but after the order of joint trial had been made, two of the charges against the first respondent were withdrawn by the Prosecution, and, in the event, he was acquitted and discharged of the offence of trafficking under s. 4(1)(a) and for destroying evidence under s. 12(i) by the learned President. When the respondents appeared before the Magistrate after the transfer, the first respondent pleaded guilty to the charge of using abusive language against Inspector Hussain and he was convicted on 29 September 1981 and fined RM50 in default five days imprisonment. The first respondent and the other two respondents however claimed trial to the charge of obstructing Inspector Hussain, and when the case came up for hearing on 5 December 1981, Counsel for the respondents raised a plea of *autrefois* acquit and convict by way of preliminary objection on the ground that in Case MA 1338/81 the First respondent had already been dealt with for the three offences arising out of the same transaction as the offence of obstruction in Case MA 1339/81 - the case under appeal. The learned Magistrate upheld the objection and acquitted and discharged the three respondents. In acquitting them, the learned Magistrate had this to say in his grounds of judgment:

> After hearing a preliminary objection raised by defence Counsel I acquitted and discharged the accused. The accused in MA: 1338/81 was charged on three counts and the case has been disposed off.
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> In MA 1339/81 the accused were charged for a different offence but arising from the same series of transactions as in MA: 1338/81 ...
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> I applied the principle of *autrefois* acquit and convict and subsequently acquitted and discharged the accused. I need not cite authorities on this as the principle is well settled and accepted.

Even assuming for one moment that the principle of *Autrefois* acquit and convict "is well settled and accepted", it will do no harm if the law on this point is re-stated so that the law can be properly applied to the facts of the present case. Under s. 303(i) Criminal Procedure Code, the plea of a previous acquittal or conviction may be pleaded either orally or in writing. Under subsections (i) and (ii) of s. 302, the plea of *Autrefois* Convict and *Autrefois* Acquit is provided as follows:

> (i) A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 166 or for which he might have been convicted under s. 167.
>
> (ii) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection (i) of s. 165.

For s. 302(i) to apply, there should be more than one trial in respect of the same person. From the appeal record, there was in fact an application made by the Prosecution for both cases to be tried jointly, and the Court did make the order for joint trial on 19 September 1979. In effect, therefore, the first respondent faced four separate charges arising out of the same transaction and the second and third respondents faced one charge jointly with the first respondent. There was therefore only one trial in respect of the four charges which is allowed under ss. 165 and 170 Criminal Procedure Code, and the fact that in the course of that trial the Prosecution had withdrawn two charges against the first respondent, and the first respondent had pleaded guilty to one charge would not transform the proceedings into two separate trails. The joint trial was part-heard and, as such, no plea of *autrefois* convict or *autrefois* acquit can apply under s. 302(i).

On the other hand, for an offence to fall under s. 302(ii), the question to be asked are:

(1) Does the present charge form part of the same transaction as the one which the accused has previously been convicted or acquitted? In other words, do both offences fall under s. 165(i) Criminal Procedure Code?

(2) Is the present offence identical as the previous one? What are their ingredients?

If the answer to both questions is the positive, then s. 302(ii) applies. [See *Connelly v. DPP* [1964] AC 1254; *Perumal Chettiar v. PP* [1957] MLJ 192 and *Sau Soo Kim @ Tai Tau Chye v. PP* [1974] FC Cr App 22].

Now, even if the present proceedings can be considered as two separate trials, applying the first test to the facts of the present case, there can be no question that the three charges preferred against the first respondent Tan Kit Leng, for which he had been acquitted on the first two charges and convicted on the third charge, formed part of the same transaction as the charge under appeal. As stated earlier, it is very clear that all the four charges in the two cases arose out of the same transaction. But applying the second test, it is equally very clear, on the facts, that the four charges were distinct offences. The charge in the present appeal was a distinct offence from the three offences for which the first respondent had been dealt with earlier. The answer to the second test is, therefore in the negative. In the event, s. 302(ii) Criminal Procedure Code also does not apply and the plea of *autrefois* convict and *autrefois* acquit cannot succeed in favour of the three respondents.

As regards the second and third respondents, there is no basis at all on which the plea can succeed either under subsection (i) or (ii) of s. 302. They were not even involved in the first case MA 1338/81. They had never been acquitted or convicted for any offence connected with the present charge. As such, the learned Magistrate was wrong in upholding the preliminary objection.

On the facts of the present case, I hold that the learned Magistrate erred in law and in fact in acquitting the three respondents by applying the principle of *autrefois* acquit and *autrefois* convict, as the circumstances surrounding the two cases do not warrant the invoking of s. 302 Criminal Procedure Code. I therefore allow this appeal and set aside the order of acquittal and discharge. A retrial is ordered before another Magistrate.

Also found at [1983] 1 CLJ 37